IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRI. APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 289 OF 1986

1. Deepraj Namdeo Zende,
   Residing at Matru Smruti Bldg.,
   Gadi, Tal. Hadapsar, Pune.

2. Kunar alias Yeshwant Dnyaneshwar Jadhav,
   At Vidhata Colony, Hadapsar,
   Pune. ... Appellants

V/s

The State of Maharashtra. ... Respondent

Mr. Shirish Gupte with M.S. Mohite for the appellants.

Ms. P. H. Kantharia, A.P.P. for the respondent State.

CORAM: R.M.S. KHANDEPARKAR &
P. V. KAKADE, JJ.

DATED: 11TH JANUARY, 2005.

PORAL JUDGMENT (Per Kakade, J.):

1. Both the appellants accused have preferred this appeal against the judgment and order passed by the Addl. Sessions Judge, Pune, convicting them for commission of the offence punishable under Sec. 302 read with 34 of the I.P.C. and sentencing them to suffer imprisonment for life. They were also convicted for committing offence punishable under Sec. 451 read with 34 of the I.P.C. and were sentenced to suffer R.I.

for three years and fine of Rs.1000/- each in default to suffer R.I. for three months. Both sentences were directed to run concurrently. Other two accused persons, namely, accused Nos. 3 and 4, however, were acquitted of all the charges by the learned Sessions Judge.

2. The prosecution case in brief is thus -

PW-4 Jaibai and PW-5 Dnyanoba are the parents of deceased Dilip. Since prior to the incident, Dilip and his wife Kanta were residing with Dilip’s parents at their residence of two rooms in Vidhata Colony, Hadapsar. There is one association by name, "Sunaram Mitra Mandal" at Hadapsar in that locality. Members of the said Mandal used to collect contributions from the inhabitants of the said locality for celebrating Ganpati festival every year. They used to install Ganpati idol in front of Vidhata Chawl where deceased was residing in an open place. Deceased Dilip and his father used to make contribution to the said Mandal every year for celebration of Ganpati festival.

It is the case of the prosecution that, on 16.9.1985, four accused persons came to their residence to collect

contribution, at which time, contribution of Rs.30/- was paid and mother of deceased Dilip asked them as to why name of Dilip was not mentioned in the previous year's report of festival though he had paid contribution of Rs.51/-, however, the accused retorted to her that it was their choice to put or not Dilip's name on their report. On 17.9.1985, Ganptai idol was installed in the locality. The four accused persons came to the house of neighbour of Jaibai to collect contribution at about 10.00 p.m.. The accused persons were in front of the house of one Jadhav, at which time, Dilip came out of his house and altercations took place between them, however, PW-4 Jaibai and her husband PW-5 Dnyanoba alongwith others intervened and separated them, at which time it is alleged that accused No.1 gave threat to Dilip.

On 27.9.1985, there was Ganpati idol immersion day, on which day PW-4 Jaibai warned deceased Dilip not to go out of the house and stay at the house. However, he went out and returned to house at about 10.30 p.m. at this juncture, she saw accused No.2 standing beneath the tree in front of the house. At that time, Dilip's father came out of the house to answer natures call and while returning he saw accused No.2 standing there. He

then went into the house and latched the door from inside and thereafter Dilip and his parents as well as Dilip's wife retired to bed. At about 11.00 p.m., Jaibai and Dnyanoba heard sound of kicks or the blows being given with something on the outer door from outside. The persons present there, were asking to open the door and were stating that they had come to kill Dilip. Hearing this, PW-4 Jaibai supported the closed door by her back and asked accused persons not to create trouble and the dispute, if any, would be looked into tomorrow, however, instead of that, the accused persons started giving blows with something on the door from outside, as a result of which she opened the latch. The door was broken open and the four accused persons entered the house. As the door was forcibly opened, the plank of the door was hit on her forehead. On entering the room accused No.1 lifted the kerosene tin placed in the window of the kitchen room and poured it on the body of Dilip and set Dilip on fire, as a result of which Dilip got fired and accused persons ran away. Dilip came out and fell in the courtyard of the house. It is the case of the prosecution that PW-5 Dnyanoba seen the door broken open by the accused and immediately rushed to the police chowky on the distance of about one furlong and informed the police about the act of the

accused persons who made forcible entry in the house. The police came on the spot and Dilip was found lying in burnt condition. Prior to that, neighbour Mangaldas Mane came running and poured water on Dilip and extinguished the fire. Police brought ambulance and put Dilip therein and took him to the Sassoon Hospital for medical treatment. PW-6 Dr. Ravikant Ghumare attended him and gave medical treatment, at which time Dilip gave history of the burns, which was reduced to writing on case paper Exh.26.

3. The investigating agency moved into action after hearing about the incident. PW-7 P.I. Shukla was on duty. Memo Exh.16 was sent to PW-3 S.B. Deshmukh, Spl. Judicial Magistrate for recording the statement of Dilip. Accordingly Shri Deshmukh received the report Exh.16 at about 12.05 midnight on 28.9.1985 and it was sent to Sassoon Hospital and recorded the dying declaration of Dilip vide Exh.17 wherein Dilip had implicated accused No.1 and others. On the basis of the said statement, offence came to be registered under Sections 307 and 451 read with 34 of the I.P.C. against the accused persons vide C.R. No. 286 of 1985.

4. On registration of the said offence, investigation

was conducted by P.I. Shukla and he visited the place of the offence and drew the spot panchnama, at which time, incriminating articles were seized from the spot and confidentially they were sent to the Chemical Analyzer for examination, whose report is received and is part of the record. The statements of other witnesses also came to be recorded on that very day i.e. on 28.9.1985. On the same day, four accused persons were arrested. The statement of Dilip was also recorded by P.I. Shukla in Sassoon Hospital on 29.9.1985. Finally, Dilip succumbed to his injury on 21.10.1985 and offence was converted into Sec. 302 and 451 read with 34 of the I.P.C. Inquest panchnama was made vide Exh.22 and the body was sent for post-mortem examination, of which report is on record. On completion of the investigation, the chargesheet was sent to the Court of law. The learned Magistrate committed the case to the Court of Sessions as the offences were exclusively triable in the Court of Sessions.

5. Charges were framed against all the accused persons for offence punishable under Sections 302, 451 read with 34 of the I.P.C. to which they pleaded not guilty. By and large, the defence theory of the accused is that of total denial of any involvement in the case. It is

suggested on behalf of the defendant that Dilip has committed the suicide as he was very sensitive in nature. The learned Sessions Judge proceeded with the trial and on the basis of evidence led on behalf of the prosecution, came to the conclusion that the evidence on record was sufficient to bring home the guilt so far as appellants accused Nos. 1 and 2 are concerned and proceeded to convict and sentence them in the aforesaid manner. He, however, concluded that evidence against accused Nos. 3 and 4 was inadequate and, therefore, they were given benefit of doubt and acquitted them from all the charges. Hence, the present appeal is filed by accused Nos. 1 & 2 only.

6. We have heard the learned counsel for the appellants as well as learned A.P.P. for the respondent State exhaustively with whose help we have also gone through the entire evidence on record.

7. At the outset, it may be noted that, prosecution case is balanced on the evidence of dying declaration Exh.27 corroborated by testimony of PW-4 Jaibai, mother of deceased Dilip and, therefore, it would be just and proper on our part to peruse the ocular evidence initially.

PW-4 Jaibai has, in her evidence, given history of practice of collecting subscription for Ganpati festival in her area and has also narrated the nature of dispute which was between the accused persons and her son deceased Dilip. She has also narrated regarding earlier incidents dated 16.9.1985 and 20.9.1985 when there was allegedly scuffle between deceased and accused persons at which time threats were given to deceased Dilip. After narrating the back ground, she has stated that, on 27.9.1985 at about 10.30 a.m. Dilip had come to the house, at which time she saw accused No.2 standing under the tree and at about 11.00 p.m. when Dilip and his wife were sleeping in the kitchen i.e. inside room and that herself and her husband were in the outside room, she heard sound of kicks and blows given on the front door. They woke up and heard that the persons outside were asking for opening the door and they were stating that they had come to kill Dilip. Inspite of her earlier reluctance, according to her, she opened the latch of the door and accused persons forcibly entered into the room. According to her, accused No.1 lifted the kerosene can which was placed in the window of the kitchen room and poured the kerosene on the body of Dilip and thereafter accused No.2 lifted the match-box

and set Dilip on fire. Thereafter they all ran away. Dilip ran in the courtyard. Neighbours gathered and doused the flames.

This crux of the version of Jaibai runs contrary to the dying declaration on record. Moreover, it is interesting to note as to how Jaibai has fared in her cross-examination. Perusal of her cross-examination reveals that, admittedly, Dilip was sleeping in the inside room i.e. kitchen room and she was near the front door of the house during the entire incident. She has candidly admitted that during the entire period of incident she did not enter in inside room. The accused were in the inner room for about 4 to 5 minutes during which time she was near the front door and also did not make any attempt to intercept the accused persons and also did not call the neighbours for help. Now there is absolutely no evidence on record regarding the fact that, if the kitchen of the house of Dilip where he was sleeping was visible from the front door where Jaibai was all the time standing during the incident. Neither spot panchnama nor any other witnesses including the Investigating Officer are in position to enlighten upon all these points. If it is so, then there is reason to doubt whether Jaibai was in position to see the accused

persons pouring kerosene on the person of Dilip and set him ablazed. It is also to be noted that, she has admitted in her cross-examination that she did not open the door and unlatch it on her own but it was broken open by giving blows with bars from outside by the accused persons and the door was forcibly broken opened. This version is also repeated by other witnesses as well as Dilip in his dying declaration, however, this aspect is delied by the version found in the spot panchnama also. The Investigating officer has categorically stated that, when he visited the spot he did not notice broken door at all. PW-4 Jaibai's evidence is further rendered doubtful when she has admitted that herself and her husband or Dilip did not disclose the incident or names of culprits to anybody after the police had come or even to her neighbours.

8. So far as the evidence of PW-5 father of deceased is concerned, admittedly, he is not an eye witness and according to him, when the door was broken open by the accused persons, he immediately rushed to the nearby police chowky to inform them about the arrival of accused persons. Here again, he tried to introduce the theory of breaking open the door by the accused persons which aspect is not established by physical evidence on

record, namely, the spot panchnama or testimony of the Investigating Officer who has categorically stated that he did not notice any broken door of that house when he immediately visited the spot of incident.

9. Evidence of PW-3 Deshmukh, Special Judicial Magistrate shows that he had occasion to record more than 800 dying declarations prior to recording this one and has further stated that he was summoned by the police to the Sassoon Hospital and requested the medical officer to accompany him for recording the statement of Dilip. Then he went to the patient and found that he was fully conscious and saw burns on his person and, therefore, he disclosed the identity and asked him how he sustained burns. Thereafter Dilip gave his statement which was recorded by him and Dilip's signature was obtained thereon vide Exh.17. According to him, the medical officer signed on the statement that the patient was conscious to give his statement and medical officer signed it in his presence.

Turning to the contents of dying declaration Exh.17, we must note that the endorsement of the medical officer is not regarding his examination but it is to the effect that the patient was conscious and well oriented in

order to give the statement. The document Exh.17 also becomes suspicious for more than one reason. We propose to make reference to the contents of the statement itself at later stage. Initially, we must note that the endorsement of the medical officer is thus - "Patient conscious to give history." Doctor has signed and put date 27.9.1985 below his signature. On concluding part of the dying declaration, surprisingly enough, the medical officer has not made any speaking endorsement but has just mentioned "Before me" with signature, as if he was attesting witness to the same. Moreover, the very placement of this concluding endorsement by the medical officer is also not under the statement made by the injured but on the left side of the paper so as to give impression that the concluding endorsement was made earlier and concluding para of the statement was written subsequently. We have no doubt whatsoever that these aspects have rendered the dying declaration a suspect and is sufficient to raise doubts about its genuine nature.

Turning to the contents of the statement, deceased Dilip has stated that, during the earlier incident there were altercations between himself and accused Nos. 1, 2 and 3. Thereafter, regarding the actual incident he had

stated that the culprits broke open the front door of his house with iron rods and entered into the house and thereafter the culprits (accused persons not named) poured kerosene upon him and accused No.1 put matchstick to him, as a result of which he was set on fire. He has further stated that, his wife, mother and father were in the house and were protesting against the assault and, therefore, PW-4 Jaibai - his mother was assaulted with iron rod. Thereafter his father tried to intervene but he was also assaulted with iron rod, but he himself was not assaulted with iron rod. Now this version is totally contrary not only to the evidence of PW-4 Jaibai as well as PW-5 Dnyanoba but has introduced a new theory, which is not the case of the prosecution itself. There is absolutely no evidence on record that either Jaibai or Dnyanoba were assaulted with iron rod or even assaulted at all. In fact, if PW-5’s version is to be accepted, he did not witness the incident itself and ran to the police when door was broken open. In view of this aspect, we are not inclined to rely upon the document of dying declaration as it is clouded with doubts as noted above.

10. This is more so if we peruse the testimony of Dr. Ghumare who received Dilip in Sassoon Hospital and gave

medical treatment. According to him, he recorded the history from Dilip which should be in fact the first dying declaration from Dilip which is at Exh.26. If we peruse the document itself, it is clear that none of the accused are named by Dilip to be the culprits involved in the incident. In fact, while giving history, Dilip has categorically stated to the doctor that he had no previous enmity with the culprits who had put him on fire which is totally contrary to his dying declaration vide Exh.17 wherein he gave history of previous enmity without naming other accused persons except accused No.1 to be the culprits. All these aspects culminates in creating suspicion regarding the veracity of the prosecution case because it is quite evident that deceased Dilip knew the accused persons by names and should have no difficulty in identifying them and, therefore, there was no reason why he should not name them while giving history to the medical officer or even in the course of dying declaration before the special Judicial Magistrate. Mere naming of accused No.1 in actual incident would not be sufficient in our opinion to accept the entire evidence as true as there is no satisfactory explanation for the doubts created in our minds with regard go the various vital aspects of the evidence which we have pointed out.

It is also to be noted that, evidently there were several neighbours who gathered at the scene of incident immediately after it took place. In fact, there is evidence that some neighbours saw the culprits even prior to the incident, however, they have not been examined at all and such omission is not explained by the prosecution. It also cannot be overlooked that no formal F.I.R. has come on record and dying declaration Exh.17 itself appears to be treated as F.I.R. on which basis the offence was registered. Be that as it may, the fact remains that the entire prosecution evidence on record fails to inspire confidence so as to accept the story given in the dying declaration as true and correct and, therefore, we are of the view that the prosecution has failed to establish its case with cogent and conclusive evidence so as to bring home the guilt against the appellants. No doubt that the evidence on record is sufficient to create suspicion in our mind regarding involvement of appellants in this ghastly crime, however, the suspicion whatsoever grave, cannot take place of hard proof and, therefore, appellants are entitled to the benefit of doubt.

11. It appears that the learned Trial Judge overlooked

these aspects while deciding the case against the present appellants, as a result of which the appellants came to be convicted, however, as noted above, we hold that the evidence on record is not sufficient to bring home the guilt and, therefore, the appellants are entitled to the benefit of doubt and acquittal. Hence the order :-

O R D E R

The appeal is hereby allowed. The judgment and order passed by the Addl. Sessions Judge, Pune, dated 11.4.1986 against the appellants stands set aside. Both accused are acquitted of all the charges levelled against them. The appellants are on bail and the bail bonds stand cancelled.

(R.M.S. KHANDEPARKAR, J.)

(P.V. KAKADE, J.)